

COMPLIANCE BOARD OPINION NO. 03-9

June 9, 2003

Ms. Sharon Nobles

The Open Meetings Compliance Board has considered your complaint alleging that the New Windsor Town Council violated certain procedural requirements of the Open Meetings Act in connection with a meeting held March 5, 2003. For the reasons explained below, we conclude that the Council did not violate the Act by its failure to issue a revised meeting notice when a decision was made shortly before the start of the meeting to conduct part of the meeting as a closed session. In other respects, the Council acknowledged that it violated the Act by failing to provide a written statement prior to the closed session and adequately reporting information in connection with the closed session as part of its minutes.

I

Complaint and Response

The complaint primarily addressed a meeting of the New Windsor Town Council held March 5, 2003, at the New Windsor Fire Hall. According to the complaint, the Council failed to advertise or post an agenda for the meeting. The complaint noted that the Mayor was reported as saying that there was no agenda for the meeting. At the end of the public session, the Mayor announced that the Council would be going into closed session to discuss land acquisition.

The complaint alleged three specific violations of the Open Meetings Act: (1) the Council's failure to give notice that a closed session would be conducted as required under §10-506(b)(3);¹ (2) the failure to provide a written statement in connection with the closed session as required under §10-508(d)(2)(ii); and (3) the failure to include information required in connection with closed meetings in the minutes of the subsequent open meeting as required under §10-509(c)(2). The complaint further indicated that the alleged violations reflect a pattern of conduct by the Council, particularly at its mid-month work sessions. In support of the allegations, the complaint included select copies of agendas and minutes of Council meetings dating back to June 2002.

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

In a timely response on behalf of the Council, Michelle D. Ostrander, Esquire, municipal attorney for the Town, indicated that the Council holds a monthly meeting on the first Wednesday of each month – a schedule reflective of longstanding practice. At the end of each meeting, the Mayor announces the dates of the next scheduled work session and meeting. The Town Clerk ordinarily posts a notice of the meeting on a bulletin board outside of the building a day in advance, provided that the notice is ready at that time. The agenda for the March 5 meeting was available to anyone in attendance prior to the start of the meeting. The meeting was advertised according to the Council's established procedure. Because the decision to conduct the closed session was not made until shortly before the start of the meeting, the Council's position is that the failure to provide advance notice of the closing did not violate the Act.

In terms of procedural requirements for closing a meeting, the Council indicated that the reason for the closed session was publicly announced as part of the motion to close the meeting and a vote authorizing closure was then taken. The Council explained that issues sometimes arise at Council meetings that necessitate an unplanned closed session. However, the Council also indicated that the number of regular meetings or work sessions that are closed to the public is relatively few.

The Council acknowledged that it erred in not providing a written statement with a specific reference to the applicable authority prior to the closed meeting March 5 and that minutes approved at the subsequent meeting should have included additional details.² However, Ms. Ostrander informed us that she has reviewed these matters with the Town Clerk and she feels confident of future compliance with these procedural aspects of the Act.

II

Notice of Closed Session

The complaint alleged that the Council violated the Open Meetings Act by failing to give advance notice that a part of the March 5, 2003, meeting would be closed to the public. *See* §10-506(b)(3). The Council views the situation

² Following a session closed under the Act, a public body is required to include certain information in the minutes of the next open meeting. *See* §10-509(c)(2). However, provided the public is aware of the practice and the information is complete, we have approved the practice of public bodies' including the required information in the publicly-available minutes of the same date, recognizing that the practice makes the information available to the public sooner. *See* Compliance Board Opinion 02-2 (February 25, 2002), slip op. at 6-7. We interpret the Council's reference to minutes approved at the subsequent meeting as suggesting that the latter practice is employed.

differently. Because the decision to hold a closed session was not made until shortly before the start of the meeting, the Council's position is that no violation occurred.

Before a public body conducts an open or closed meeting that is subject to the Open Meetings Act, the Act requires that reasonable advance notice be given and sets forth the basic information that the notice must contain. §10-506(a) and (b). Among other information, "*if appropriate*, [the notice must] include a statement that a part or all of a meeting may be conducted in closed session." §10-506(b)(3) (emphasis supplied). The phrase "if appropriate" simply recognizes the possibility that, at the time a notice is prepared, the public body (or its presiding officer) can anticipate whether or not the meeting, or part of the meeting, will be closed under provisions of the Act. Compliance Board Opinion 00-3 (April 20, 2000), slip op. at 3. Stated otherwise, absent any reason to believe that a meeting will be closed, no reference to a closed session is required. Compliance Board Opinion 93-7 (June 22, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 38, 39.

The Act does not explicitly address the situation in which a public body decides that it will need to conduct a closed session *after* it has provided notice of a meeting with no reference to a closed session. Conversely, a public body might subsequently determine that the public will be allowed to attend a meeting that had previously been announced as closed. Under either scenario, the public's decision whether or not to attend may be affected. Thus, when a public body decides that a meeting will be closed after giving notice without referring to the closure, or decides to open a meeting previously announced as closed, the public body normally is obligated to issue a corrected notice that accurately reflects the information required under §10-506(b). *See, e.g.*, Compliance Board Opinion 01-3 (February 1, 2001), slip op. at 3 (if a public body provides notice and then some material element about the meeting - that is, its date, time, place, and closed or open status - changes, issuance of a revised notice required).

Nevertheless, here the Council tells us that the decision to conduct a closed session was not made until shortly before the start of the meeting. Previously, we have recognized that, notwithstanding the general rule requiring notice of a meeting cancellation, a public body is not required to provide such notice when the decision was made at the scheduled start of the meeting, once the absence of a quorum was recognized. Compliance Board Opinion 02-4 (May 21, 2002), slip op. at 3. Under the circumstances, advance notice of the cancellation was simply not feasible. *Id.*

Here, the Council has not told us exactly when the decision to close a part of the meeting was made. However, the decision apparently was made at a point just

before the start of the meeting.³ Under the circumstances, the failure to issue a corrected notice, reflecting the decision to close part of the meeting, did not violate the Act.⁴

III

Record of Closed Session

The complaint alleged that the presiding officer failed to prepare a written statement of the reason for the closed session held March 5, 2003, as required under §10-508(d)(2)(ii). The complaint also indicated that the minutes of subsequent public meetings fail to document prior closed sessions in accordance with §10-509(c)(2). In light of the Council's acknowledgment that the required statement was not completed⁵ and that additional detail should have been reflected in the minutes, extensive discussion of these matters in connection with the March 5 meeting or prior meetings is not warranted. We note with approval Ms. Ostrander's assurances that remedial steps have been taken to ensure future compliance.

IV

Miscellaneous

Although we do not interpret the complaint as alleging a violation the Act's notice requirements other than as related to compliance with §10-506(b)(3), we deem it appropriate to add a brief word of caution about compliance with these notice requirements as a whole.

³ It is unclear from the record who made the decision. We trust that it was not a quorum of the Council. Otherwise, the body's decision-making process about the status of the meeting may well have been subject to the Open Meetings Act.

⁴ We understand that some public bodies avoid this issue by including a boilerplate statement in their meeting notices to the effect that the body may go into closed session at any time. While we have not encouraged this approach, we have ruled that it does not violate the Act. *See* Compliance Board Opinion 02-6 (June 18, 2002), slip op. at 4.

⁵ In its response, the Council noted that the justification of the closed session was orally provided as part of the motion to close the meeting, *i.e.*, that the meeting was closed to discuss "land acquisition." We simply note that, had this minimal description been recorded on a written statement, it would have still violated §10-508(d)(2)(ii), since it would have provided no information to the public other than merely parroting the applicable statutory justification – §10-508(a)(3). *See, e.g.*, Compliance Board Opinion 01-12 (June 28, 2001), slip op. at 4.

With respect to the timing of notice, the Act simply requires that a public body “give *reasonable* advance notice of the session.” §10-506(a) (emphasis supplied). The Attorney General has recommended that “given the policies of the Act, ... notice of a future meeting should be given as soon as is practicable after the body has fixed the date, time, and place of its next meeting.” *Open Meetings Act Manual*, p. 18. With respect to the method of notice, the Act allows a public body such as the Council considerable flexibility. See §10-506(c)(2)-(4). Thus, had media representatives been in attendance at the prior meeting when the March 5 meeting was announced, the notice requirement ordinarily would have been satisfied. Compliance Board Opinion 93-5 (April 23, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 33.-34. In contrast, a long standing practice of holding meetings on a given day of the month, absent some form of individual notice in advance of each meeting, would violate the Act. Compliance Board Opinion 94-4 (July 18, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 69, 71 (particularized notice of individual meetings required).

As noted under Part II, the Act sets forth minimal information that a public body must provide in a notice of a meeting. §10-506(b). The Act’s notice requirements do not require a public body to make an agenda available to the public prior to a meeting. Compliance Board Opinion 02-2 (February 25, 2002), slip op. at 4. However, we recognize that many public bodies routinely do include a proposed agenda as part of their notice to the public, a practice we have commended. *Id.*, at 5; *see also* Compliance Board Opinion 99-7 (June 28, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 52, 54.

We were not asked, and we do not decide, whether reasonable advance notice was provided prior to the March 5 meeting.⁶ However, while we encourage public bodies to voluntarily provide an agenda in advance of their meetings, we caution that notice should not be delayed, while awaiting preparation of an agenda, if the delay would result in unreasonably short notice. To avoid this problem, a public body can issue a “bare-bones” meeting notice and supplement it with an agenda later.

V

Conclusion

The New Windsor Town Council did not violate the Open Meetings Act by failing to issue a revised meeting notice, indicating that a part of the March 5 meeting would be closed to the public, in light of the short period between the time of the decision and the start of the meeting – a period that appears to have made

⁶ The written notice apparently was posted a day before the meeting. See Part I above.

issuance of a revised notice unfeasible. The Council candidly acknowledged, and we therefore find, that the Act was violated by the failure to provide a written statement prior to the closed session and the failure to properly document the closed session in subsequent minutes.

OPEN MEETINGS COMPLIANCE BOARD

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